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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO MANUEL SOTELO,

Defendant and Appellant.

D073986

(Super. Ct. No. SCN370066)

APPEAL from a judgment of the Superior Court of San Diego County,  
Richard S. Whitney, Judge. Affirmed in part, reversed in part, and remanded for  
resentencing.

Christian C. Buckley, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Marvin E.  
Mizell, Deputy Attorneys General, for Plaintiff and Respondent.

Apprehended soon after a shooting in rival gang territory, Varrio San Marcos (VSM) gang member Eduardo Manuel Sotelo was found guilty as charged of attempted murder, shooting at an inhabited dwelling, and assault with a semiautomatic firearm. The jury further found the firearm and gang enhancements true, and Sotelo admitted his priors. The court imposed an aggregate term of 53 years plus 35 years to life.

Sotelo contests both his convictions and the resulting sentences. He challenges the admissibility of gang-related evidence introduced at trial, the sufficiency of the evidence to show he intended to shoot at an inhabited building, and the adequacy of pleading and proof regarding the gang enhancement penalty provision applied to one count. We reject all but one of these claims; although we agree with him that the court erred in admitting Sotelo's prior gang-related assault conviction to show his identity as the shooter, we conclude that error was harmless.

We then turn to Sotelo's sentencing claims. He seeks remand for resentencing to permit the trial court to exercise its discretion under Penal Code section 1385 pursuant to recent changes in the law to strike the serious felony prior, firearm enhancements, and gang enhancements, as well as to make a record of youth-related mitigating factors pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 for a later youth offender parole hearing. We accept the People's concession that remand is necessary for resentencing pursuant to Senate Bill No. 1393. (Stats. 2018, ch. 1013, §§ 1–2.) This necessitates a full resentencing hearing, meaning we need not reach the remaining sentencing claims. Accordingly, we remand the case for resentencing but in all other respects affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

VSM and South Los are rival gangs in San Marcos. Around 4:48 p.m. on February 22, 2017, a white Jeep Liberty with a missing spare tire arrived outside an apartment complex on Autumn Drive in South Los territory. A father and son, Samuel G., Sr., and Samuel G., Jr., were carrying a mattress to the dumpster in the complex parking lot when they heard a heated argument between two young men and saw one apparently chasing the other. Jesus B., who lived in a second story apartment in the complex, also heard a loud argument and remembered one man saying, "fuck you" and "South Los."

One of the men, later identified as Sotelo, jumped a short fence and got into the passenger side of the parked Jeep. As the Jeep started to drive off, the other man threw a rock at it, prompting the passenger to get out. Jesus watched from his window as the passenger pulled out a gun and fired at the other person, who was standing right below his apartment. It appeared as though the gun jammed after the first shot, and the passenger entered the Jeep for a few seconds, reemerged, and fired two more shots. Samuel Sr. and Jr. had a slightly different recollection—the Jeep passenger got out and pointed the gun, but nothing happened; he then went to his car, reemerged, and fired two or three more shots at the standing man.

All four apartments near the shooting were occupied, and one of the bullets pierced Jesus's living room wall. The intended victim took off running and was never found; the Jeep drove away. Although the entire incident was a brief 45 seconds, Jesus remembered that the passenger/shooter was in his 20s and wore a black hooded

sweatshirt and dark pants or jeans. He could not recall seeing any tattoos on his hands or neck. The Jeep driver wore a light gray hooded sweatshirt and had a thin build with prominent cheekbones.

Deputies with the San Diego County Sheriff's Department in San Marcos arrived at the Autumn Drive complex after a 911 emergency call. Jesus told deputies he had seen a white Jeep Liberty. Samuel Sr. and Jr. likewise stated they saw a white Jeep missing its spare tire.

Deputies assigned to the gang enforcement team knew from prior field contacts that Sotelo drove a white Jeep Liberty that was missing a spare tire. They drove to a location where they suspected they might find Sotelo. On their way, around 5:48 p.m., they spotted Sotelo's vehicle parked at a Jack in the Box on Sycamore Drive and found Sotelo inside. He had hidden his keys in a napkin dispenser at a table different than the one he was sitting at. When deputies told him they were investigating a shooting, Sotelo replied that he had been at a job interview at a different Jack in the Box, located on Capalina Road.

Meanwhile, a deputy sheriff transported Jesus to the Sycamore Drive Jack in the Box to identify a possible suspect curbside. They first approached the Jeep. Jesus said the vehicle looked similar to the one at the scene, but he thought the vehicle was a Jeep Cherokee. At trial, Jesus explained that after he initially identified the shooter's vehicle as a Jeep Liberty, he then went online to look at pictures of Jeep models and decided he had seen a Cherokee instead. The two vehicles are very similar, and Jesus mistakenly believed from his Internet search that the Liberty was *not* a four-door vehicle like the one

he had seen. Nevertheless, when they approached Sotelo, Jesus declared unprompted that he was 100 percent sure that Sotelo was the shooter.<sup>1</sup> Deputy Ricardo Carlon arrested Sotelo based on Jesus's positive identification.

Security footage was recovered from the Jack in the Box locations at Sycamore Drive and Capalina Road, and from an apartment complex near the shooting on Autumn Drive. Sotelo was indeed present for a job interview at the Jack in the Box on Capalina Road at 3:47 p.m., seen wearing a blue plaid long-sleeved shirt and a baseball cap. But he left at 4:12 p.m. in his Jeep with VSM member Javier Castellanos. The Jeep turned eastbound on Capalina Road, traveling in the direction of Autumn Drive. Video from an adjacent apartment complex on Autumn Drive showed a white vehicle traveling toward the crime scene at 4:47 p.m. Security footage from the Sycamore Drive Jack in the Box showed Sotelo arriving at 5:36 p.m. Now wearing a white t-shirt, Sotelo entered the restaurant and used the restroom before deputies arrived 12 minutes later.

Cell site data approximated Sotelo's whereabouts. At 3:20 p.m., he made a call that connected its signal to the cell tower adjacent to the Jack in the Box on Capalina Road. At 4:31 p.m., another call from his phone connected with a tower located about half to two-thirds of a mile east of the crime scene at Autumn Drive; the call was coming from a phone located west of the tower, coming toward the crime scene location. At 4:59 p.m., Sotelo's phone connected with a cell tower just north of the arrest location on Sycamore Drive. Between 5:11 and 5:18 p.m., there were three additional calls that

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<sup>1</sup> Jesus also identified Sotelo as the shooter at trial.

connected to the same tower. As explained at trial, although a cell phone will not necessarily connect to the closest tower, it will look for the strongest signal, which will typically come from the nearest tower.

When deputies processed Sotelo's Jeep, they did not find a gun. As the gang expert would explain at trial, after a shooting, a firearm is considered "hot," meaning it will get dumped to evade detection. There was a pile of clothing in the car, which included a long-sleeved blue and white shirt similar to the one Sotelo was seen wearing at his job interview that afternoon and a dark navy hooded sweatshirt that could appear black, similar to what Jesus saw the shooter wear. DNA analysis from the steering wheel of Sotelo's Jeep showed a mixture of DNA from two individuals. One was Sotelo, but the other was *not* Javier Castellanos. As explained at trial, it was possible for a person to touch a surface but not leave detectable amounts of DNA.

The weapon that fired the casings found at Autumn Drive was a Smith & Wesson semiautomatic 9-mm Luger. It was recovered in August 2017 during a patdown search of VSM associate Luis Talavera. Although Sotelo had used the restroom at the Sycamore Drive Jack in the Box before deputies arrived, his left palm tested positive for a single particle of gunshot residue. This finding strongly indicated that Sotelo had been in the environment of gunshot residue—either he discharged a weapon, was in the vicinity of a discharged weapon, or touched something with gunshot residue on it. There were no other explanations for the result.

The San Diego County District Attorney charged Sotelo by amended information with attempted murder (Pen. Code, §§ 187, subd. (a), 664, count 1),<sup>2</sup> shooting at an inhabited dwelling (§ 246, count 2), and assault with a semiautomatic firearm (§ 245, subd. (b), count 3). As to count 1, the information alleged that Sotelo personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). On counts 1 and 3, it was alleged that he personally used a firearm (§ 12022.5, subd. (a)). A gang enhancement attached to all three counts alleged that Sotelo had acted for the benefit of a criminal street gang (§ 186.22, subd. (b)). Finally, it was alleged that Sotelo had served a prior prison term (§§ 667.5, subd. (b), 668), was previously convicted of a serious felony (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and had suffered a prior strike (§§ 667, subds. (b)–(i), 668, 1170.12). These priors were all connected to a 2013 conviction for aggravated assault against a South Los gang member.

Before trial, the prosecution filed motions seeking to admit certain gang-related evidence. Over defense objection, the court granted the motions, accepting the prosecution's argument that the evidence was probative of Sotelo's motive and of VSM membership and activity. Specifically, the prosecution introduced evidence connected to Sotelo's 2013 assault conviction and statements he made to Deputy Carlon in October 2016, four months before the shooting.

At trial, Detective Samuel Sheppard testified as a gang expert and described the rivalry between South Los and VSM. VSM had two subsets, Ghost Town and Wolfpack,

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<sup>2</sup> Further statutory references are to the Penal Code unless otherwise indicated.

with 66 total documented members. Whereas VSM claimed the entire city as its territory, South Los (with 44 members) claimed a more concentrated area around Autumn Drive. The apartment complex at 435 Autumn Drive was at the heart of South Los territory. As Sheppard explained, rivalry between VSM and South Los was fierce, and retaliation was tit-for-tat. But rarely was retaliation immediate—because law enforcement would be on high alert, Sheppard explained it could take days, weeks, months, or even years for one gang to retaliate against the other.

Detective Sheppard opined that Sotelo was a VSM gang member for a number of reasons, including his own self-identification. Sotelo had "G.T." and "S.M." tattooed on his hands, signifying "Ghost Town San Marcos." When another deputy asked Sotelo if he was with Ghost Town, he "proudly said yes." Given a hypothetical based on the evidence, Sheppard opined that the shooting at Autumn Drive was done for the benefit of the VSM gang.

To establish that VSM was a criminal street gang, Sheppard described a pattern of VSM crimes, including Sotelo's 2013 conviction. In December 2012, Sergeant Jeffrey Ford was investigating an assault on a South Los gang member when he saw Sotelo's white Jeep Liberty. Ford met with Sotelo at his parent's home, where Sotelo admitted that while driving through the area with other VSM members, three South Los members flashed gang signs and threw rocks at his Jeep. He parked and confronted them, striking one person in the back of the head with a skateboard. After the incident, Sotelo discarded his outer shirt to evade detection and went to a fast food restaurant. During that contact, Sotelo claimed he merely associated with VSM and was not himself a member, but he



expressed clear animosity toward South Los. Certified court records showed that the 2012 skateboard incident led to a conviction in April 2013 for assault with a deadly weapon (§ 245, subd. (a)(1)).

The prosecution was also permitted to introduce evidence about Sotelo's conversation with Deputy Carlon in October 2016. Carlon made contact with a tearful Sotelo, who was sitting in his Jeep Liberty parked outside a known VSM hangout. Sotelo was upset because a young kid had been killed a few days before. When Carlon asked Sotelo if he had information about the killing, which was believed to be gang-related, Sotelo replied, "You know how things are around here. We will get them. We will get the people who killed him." Carlon cautioned Sotelo not to take matters into his own hands, but Sotelo replied, "I gotta do what I gotta do. You may or may not catch me." As Detective Sheppard would testify, after the youth's murder in October 2016, a quiet period followed with VSM appearing to lie low.

The prosecutor relied heavily on Sotelo's October 2016 statement during her arguments to the jury. The intended victim of the shooting was never identified. Nevertheless, the prosecutor claimed Sotelo fired shots at the unidentified victim on Autumn Drive to retaliate for the murder of a VSM youth four months earlier. As Sotelo had said, "he couldn't let it go. He wouldn't let it go, and that's why he did what he did." She explained that many times there is no indication *why* a murder occurred, but in this case, jurors knew Sotelo's motive and could use that to consider his guilt. There was no defense objection to the prosecutor's argument.

The defense conceded Sotelo was a gang member but identified several evidentiary gaps to suggest Sotelo was not the shooter. The sole defense witness, Dr. Richard Rappaport, testified about perception and memory issues with eyewitness identification. In this case, Jesus did not notice Sotelo's prominent hand tattoos and misidentified the vehicle; to believe a hoodie-clad Sotelo was the shooter, he would have had to change shirts before and after the shooting; Javier Castellano, the person Sotelo was allegedly with, was excluded from the steering wheel DNA profile; gang experts had never known Sotelo to carry a gun; and the single gunshot residue particle on his left palm did not mean he shot the weapon. Noting it was unclear who the intended target of the shooting was, defense counsel stated the prosecution was merely offering theories, not evidence of a specific plan.

On November 17, 2017, the jury found Sotelo guilty as charged and found all the firearm and gang allegations true. Thereafter Sotelo waived trial on and admitted the alleged priors.

In March 2018, the court sentenced Sotelo to a determinate term of 53 years and an indeterminate term of 35 years to life in state prison, calculated as follows. On count 2, the court imposed 15 years to life under section 186.22, subdivision (b)(4), doubled to 30 years to life for the strike prior, added five years for the serious felony prior enhancement, and stayed the enhancement for the prior prison term. On count 1, the court imposed a nine-year upper term, doubled to 18 for the strike, and added 20 years for the intentional discharge of a firearm enhancement, 10 years for the gang enhancement, and five years for the serious felony prior. The court imposed and stayed the firearm use

enhancement (§ 12022.5, subd. (a)) and the enhancement for the prior prison term. The sentence imposed on count 3 was stayed pursuant to section 654.

## DISCUSSION

Sotelo challenges the judgment based on the admissibility of gang-related evidence, sufficiency of the evidence of intent on count 2, and adequacy of pleading and proof as to the gang enhancement penalty provision applied on count 2. We reject each of these claims. Sotelo also seeks remand for resentencing based on recent changes in the law. As we explain, remand is necessary for a full resentencing hearing where the court may exercise its discretion to strike the serious prior felony enhancement pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2).

### 1. *Admissibility of Gang-Related Evidence*

At trial, the prosecution introduced gang-related evidence over defense objection. Sotelo argues this was prejudicial error. We conclude the evidence was properly admitted for some (but not all) of the proffered bases, and that any error in admission for an improper basis was harmless. Finding only a single error and deeming it harmless, we reject Sotelo's claim that cumulative error from admitting both items of gang-related evidence deprived him of a fair trial.

#### a. *Additional Background*

Sotelo's 2013 assault-with-a-skateboard conviction was introduced both to show Sotelo's motive, intent, and identity in the shooting (Evid. Code, §§ 1101, subd. (b)), and as a predicate act to show a " 'pattern of criminal gang activity' " for the gang enhancement (Pen. Code, § 186.22, subd. (e)). Sotelo's October 2016 statements to

Deputy Carlon were introduced to show his retaliatory motive in the shooting four months later (Evid. Code, § 1101, subd. (b)). Defense counsel vigorously objected to the admission of both items of evidence during pretrial motions in limine.<sup>3</sup>

There were several jury instructions pertaining to the gang evidence. CALCRIM No. 370 told jurors that having a motive could tend to show guilt, whereas a lack of motive could tend to show innocence. Jurors were given a limiting instruction as to the 2013 conviction, a modified version of CALCRIM No. 375. They could consider that conviction for the limited purpose of deciding whether Sotelo was the shooter in this case, acted with the intent to kill, or had a motive to commit the offense, but not to evaluate his character or disposition. Jurors were advised to consider the similarity between the two offenses in evaluating the evidence for such limited purposes. CALCRIM No. 1403 instructed jurors that gang activity evidence could be used for a limited purpose of showing Sotelo acted with a particular intent, purpose, or knowledge, or had a motive to commit the charged crime, and could not be used to show his bad

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<sup>3</sup> We reject the People's contention that Sotelo forfeited his right to challenge admission of the 2013 assault conviction by not reasserting his objection following the court's tentative ruling. As we read the record, defense counsel vigorously objected to the admission of this evidence during motions in limine. When the prosecutor sought clarification before her opening statements, defense counsel stated the 2013 conviction should be admitted for a limited purpose and was not admissible to show motive and identity. The People cite *People v. Holloway* (2004) 33 Cal.4th 96, 133 for the proposition that where a trial court makes a tentative pretrial evidentiary ruling, a defendant's failure to renew an objection and press for a final ruling will not preserve the issue for appeal. Unlike in *Holloway*, where the defendant did not raise the theories of relevance urged on appeal at the motion in limine hearing, or take advantage of the trial court's offer to reconsider its in limine ruling at any point during trial (*ibid*), nothing Sotelo raises on appeal was not first contested before and decided by the trial court.

character. Finally, CALCRIM No. 1401 informed the jury that it had to find a pattern of gang activity involving two or more crimes to conclude that the gang enhancement was true.

b. *Legal Principles*

Other act evidence is generally inadmissible to prove a defendant's conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) However, such evidence may be admitted where relevant to prove some fact, such as motive, intent, or identity, other than his or her disposition to commit that act. (Evid. Code, § 1101, subd. (b).) Relevant evidence is evidence that has any tendency in reason to prove or disprove a disputed fact of consequence. (Evid. Code, § 210.)

When introducing other act evidence, the degree of similarity required between the other act and the charged offense depends on the purpose for which the evidence is presented. (*People v. Gutierrez* (2018) 20 Cal.App.5th 847, 859 (*Gutierrez*).) "The least degree of similarity between the uncharged act and the charged offense is required to support a rational inference of intent; a greater degree of similarity is required for common design or plan; the greatest degree of similarity is required for identity." (*Ibid.*; see *People v. Ewoldt* (1994) 7 Cal.4th 380, 402 (*Ewoldt*).)

Other act evidence may also be admitted to establish a pattern of criminal gang activity for the gang enhancement. Here, the information alleged that Sotelo committed the shooting on Autumn Drive for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, and assist in criminal conduct by gang members. (§ 186.22, subd. (b)(1).) To prove this gang enhancement,

the prosecution had to establish the existence of a criminal street gang, which in turn requires proof of a " 'pattern of criminal gang activity.' " (§ 186.22, subds. (e)–(f).) To show a pattern, the prosecution must prove two or more predicate acts committed by two or more persons. (§ 186.22, subd. (e).) A predicate act may consist of a defendant's own prior offense. (*People v. Tran* (2011) 51 Cal.4th 1040, 1046 (*Tran*).)

Even where other act evidence is relevant and admissible for a noncharacter purpose, its admissibility requires that its probative value not be substantially outweighed by its potential for prejudice. (Evid. Code, § 352; *Gutierrez, supra*, 20 Cal.App.5th at pp. 859–860.) " 'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on the issues, not evidence that is probative of a defendant's guilt.' " (*Tran, supra*, 51 Cal.4th at p. 1048.) The prejudice that the statute is designed to avoid is not the damage that naturally flows from highly probative evidence, but rather the effect of leading the jury to prejudge a person or cause based on extraneous factors. (*Ibid.*)

As the Supreme Court has recognized, gang evidence can be highly inflammatory, and "trial courts should carefully scrutinize such evidence before admitting it." (*People v. Williams* (1997) 16 Cal.4th 153, 193 (*Williams*).) Nevertheless, "in a gang-related case, gang evidence is admissible if relevant to motive or identity, so long as its probative value is not outweighed by its prejudicial effect." (*Ibid.*; see *People v. Carter* (2003) 30 Cal.4th 1166, 1194.) Gang evidence is relevant and admissible if the very reason for the underlying crime, i.e., the motive, is gang-related. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1167.) Where gang evidence is otherwise relevant and admissible,

Evidence Code section 352 requires its exclusion "only when its probative value is *substantially* outweighed by its prejudicial effect." (*Tran, supra*, 51 Cal.4th at p. 1047.)

"We review the trial court's determination of admissibility of evidence under Evidence Code sections 1101, subdivision (b), and 352 for abuse of discretion." (*Gutierrez, supra*, 20 Cal.App.5th at p. 860.) If error is found, we evaluate prejudice under the *Watson*<sup>4</sup> standard, assessing whether it is reasonably probable Sotelo would have obtained a more favorable verdict absent the error. (*Id.* at p. 862.)

c. *2013 Assault Conviction*

Sotelo claims the trial court erred when it admitted evidence of his 2013 gang conviction for assault with a deadly weapon. He argues that there are insufficient similarities between that 2012 incident, in which Sotelo hit a South Los member on the head with a skateboard, and the shooting on Autumn Drive years later. He further contends the evidence should have been excluded under Evidence Code section 352 to the extent it was otherwise admissible. The People disagree, asserting that the evidence was properly admitted as probative of motive, intent, and identity, and further admissible as a predicate gang offense.

We conclude there was no abuse of discretion in admitting the 2013 conviction as probative of Sotelo's motive and intent, and as a predicate act for the gang enhancement. Any error in admitting it for purposes of showing Sotelo's identity as the shooter was harmless.

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<sup>4</sup> *People v. Watson* (1956) 46 Cal.2d 818, 836.

The least degree of similarity between the other act and the charged offense is required where other act evidence is offered under Evidence Code section 1101, subdivision (b) to prove intent. (*Ewoldt, supra*, 7 Cal.4th 402.) All that is necessary is that the other act be sufficiently similar to support an inference that the defendant probably harbored the same intent on both occasions. (*Ibid.*) Likewise, to show motive, commonalities between the two offenses "are not crucial where the mere *fact* that the defendant committed a prior offense gives rise to an inference that he had a motive to commit a later one." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1129–1130, accord, *People v. Armstrong* (2016) 1 Cal.5th 432, 457 (*Armstrong*).)

Although indisputably inflammatory, gang-related evidence is commonly admitted to show a defendant's motive or intent in a gang case.<sup>5</sup> For instance, in *Williams*, evidence that the defendant in a gang-related shooting led a meeting earlier that day arming members and telling them to protect their turf was properly admitted to show the defendant's motive in shooting a victim wearing rival gang colors. (*Williams, supra*, 16 Cal.4th at pp. 177–179, 194.) Likewise, a gang member's prior police contacts were relevant and not *unduly* prejudicial in a murder prosecution where they proved the charged gang enhancement and explained the defendant's motive for committing the murders. (*People v. Mendez* (2019) 7 Cal.5th 680, 691 (*Mendez*).) Taken together, the

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<sup>5</sup> By contrast, in cases *not* involving a gang enhancement, evidence of gang membership is potentially prejudicial and should be excluded if its probative value is minimal. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; see *People v. Albarran* (2007) 149 Cal.App.4th 214, 229 (*Albarran*) [admission of gang evidence prejudicial where the only indication a shooting was gang-related was defendant's own gang affiliation].)



evidence "tended to show [the defendant] actively involved himself in the gang's criminal activities, rather than just passively claimed the gang among his peers." (*Ibid.*)

Also helpful is *People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1042 (*Sedillo*). There the defendant was charged with attempted murder and shooting at an inhabited dwelling (a Long Beach home) following a gang-related shooting in which she was allegedly the getaway driver. She challenged the admission at trial of her recorded statements that as a teen, she would go to the mall and violently assault rival gang members and their infant children. (*Id.* at pp. 1058–1059.) In her view, these statements were irrelevant and prejudicial, creating the impermissible inference her callous behavior as a teen left her likely to assist in coldblooded shootings. (*Id.* at p. 1058.) The appellate court disagreed, concluding that the evidence was admissible to prove her motive and intent to attack rival gang members. As the court explained, "both crimes show that defendant was motivated by an extreme degree of animosity toward rival gangs and she would resort to violent means to express that animosity." (*Id.* at p. 1059.)

As in *Sedillo*, the 2013 conviction was relevant and admissible to show Sotelo's gang-related motive and intent in shooting at the apparent South Los affiliate on Autumn Drive. In 2012, Sotelo was driving with VSM members when South Los members threw rocks and flashed gang signs at his Jeep. He stopped the car, got out, and struck a rival gang member in the head with a skateboard. In this case, Sotelo was about to drive away when a person who yelled "South Los" threw a rock at his car. He got out and proceeded to shoot at the rival gang member. The 2013 conviction could support the inference that Sotelo was motivated to respond to rival gang provocation through violent means.

(*Sedillo*, *supra*, 235 Cal.App.4th at pp. 1059–1060.) Likewise, the least degree of similarity between the other act and the charged offense is required to show intent, and there is more similarity between the two events than found in *Sedillo*.

The evidence was likewise relevant and admissible as a predicate act for the gang enhancement. Sotelo acknowledges *Tran*, *supra*, 51 Cal.4th 1040, which held that a defendant's own prior offense is admissible to establish a pattern of gang activity for the substantive crime under the Street Terrorism Enforcement and Prevention (STEP) Act. (§§ 186.20 et seq., at 186.22, subd. (a).) But he argues that unlike the substantive offense, the gang *enhancement* (§ 186.22, subd. (b)(1)) does not require proof that the defendant was an active gang participant. As such, he claims it was unduly prejudicial and "cumulative" to admit his 2013 conviction as a predicate act for the enhancement where other evidence could have established the necessary pattern.

The purported distinction does not persuade us. Both the substantive offense and enhancement require proof of a pattern of gang activity, as defined in subdivision (e) of section 186.22. (See § 186.22, subs. (a), (b)(1), (f).) *Tran* held that a defendant's own prior act could qualify as a predicate offense and further found such evidence admissible under Evidence Code section 352. (*Tran*, *supra*, 51 Cal.4th at pp. 1046–1050.) There is no reason to apply a different rule for the enhancement. (See *People v. Prunty* (2015) 62 Cal.4th 59, 72, fn.3.) Moreover, even if there was other predicate evidence available, the prosecution cannot be compelled to present its case in the sanitized manner favored by the defense. (*Tran*, at p. 1049.) "That the prosecution might be able to develop evidence of predicate offenses committed by other gang members therefore does not require

exclusion of a defendant's own separate offense to show a pattern of criminal gang activity." (*Ibid.*)

Evidence Code section 352 did not otherwise require exclusion of the 2013 assault conviction. The potential for undue prejudice is decreased when the other act evidence emanates from sources independent of the charged offenses; when the act resulted in a criminal conviction; and when it involves conduct that is less inflammatory than the charged offense. (*Tran, supra*, 51 Cal.4th at pp. 1047.) All three factors are present here, as they were in *Tran*. (*Id.* at p. 1050.) The 2013 conviction occurred years before his arrest on the current charges and was based on Sotelo's own admission, an independent source from the current charges. It involved assaulting a person with a skateboard, an act substantially less inflammatory than shooting at a person with a semiautomatic firearm. It also resulted in a criminal conviction, lessening the likelihood that the jury would be inclined to punish the defendant for an uncharged act regardless of his guilt for the charged offense. (*Tran*, at p. 1047.) We cannot say the trial court abused its discretion in admitting the 2013 conviction to show Sotelo's gang-related motive and intent for the shooting, or to establish a predicate act for the gang enhancement. The evidence was not unduly prejudicial when offered for these purposes.

However, the prosecution also offered the 2013 conviction to show Sotelo's *identity* as the shooter under Evidence Code section 1101, subdivision (b). We question this basis for admission. "The greatest degree of similarity is required for evidence of [other act] misconduct to be relevant to prove identity." (*Ewoldt, supra*, 7 Cal.4th at p. 403.) The common features must be sufficiently distinctive, as like a signature, to

support the inference that the same person committed both acts. (*Ibid.*; accord *Armstrong, supra*, 1 Cal.5th at pp. 456–457.) The People cite as "distinctive common marks" the presence of Sotelo's white Jeep Liberty on both occasions, gang comments, a thrown rock, and violence directed against South Los. Even if we add to this list the fact that the perpetrator changed his shirt after both offenses and wound up going to a fast food restaurant, these common elements appear insufficiently distinctive to support the inference that the *same person* committed both crimes.

Nevertheless, any error in admitting the 2013 conviction for identity purposes was harmless. The jury could properly consider the evidence as to motive and intent and to find a pattern of gang activity, and the prosecutor only obliquely referenced the skateboard incident during her closing argument. Although there were gaps in the evidence, there was substantial evidence that Sotelo was in fact the shooter. Jesus identified him; he and the two other eyewitnesses saw a vehicle similar to Sotelo's Jeep; cell site data placed him in the vicinity of the crime scene; gunshot residue was on his palm even after he washed his hands; and a dark hooded sweatshirt like the one Jesus saw the shooter wearing was found in his Jeep. On this record, it is not reasonably probable that but for its admission as to identity, the jury would have reached a more favorable verdict. (See *Gutierrez, supra*, 20 Cal.App.5th at p. 862.)

d. *2016 Statements to Deputy Carlon*

Next, Sotelo argues the court prejudicially erred in admitting statements he made to Deputy Carlon in October 2016, four months before the shooting. Sotelo, found sitting in his parked Jeep outside a known gang hangout, was upset over the recent murder of a

VSM youth in a suspected gang-related killing. He told Carlon he would take matters into his own hands: "You know how things are around here. We will get them. We will get the people who killed him." "I gotta do what I gotta do. You may or may not catch me."

The People filed a pretrial motion in limine seeking to introduce Sotelo's 2016 statement, arguing it was relevant to show Sotelo's retaliatory motive for the Autumn Drive shooting, and to establish his role as a VSM member. Defense counsel objected, arguing there was too tenuous a link to show motive. There was no evidence the VSM youth was even killed by a South Los member, much less evidence to show that the two events were connected in Sotelo's mind. Counsel further reasoned that there was ample other evidence to prove the gang enhancement. The court voiced concern about the speculative and vague nature of the proffered motive evidence but tentatively granted the prosecution's request, believing the evidence to be relevant to the charges.

Before opening statements, the prosecutor asked to clarify the court's tentative. She indicated that she intended to introduce Sotelo's 2016 statement to Carlon both to show that Sotelo was a gang member and to show his retaliatory motive. Defense counsel reiterated his concerns, but the court maintained its tentative.

The prosecutor relied heavily on this evidence in her opening and closing statements. She began her opening, "Eduardo Sotelo was not going to let it go, and that's why this happened." When Sotelo was contacted on October 30, 2016, "[h]e was upset, and he was angry about a fellow Varrio San Marcos juvenile who had been murdered in what was suspected to be a gang shooting, and he said, 'we're going to get them, and you

or may not catch me.' " Outlining what the evidence would show, the prosecutor again stated Sotelo had told deputies four months earlier "that he was going to retaliate for the VSM murder of the juvenile that he knew."

Carlton testified about Sotelo's statement at trial. The prosecution's gang expert, Detective Sheppard, testified that after the youth's murder in October 2016, a quiet period followed with VSM appearing to lie low. But with the shooting victim in this case unidentified, no further evidence was offered at trial to connect this shooting to that earlier incident.

As with her opening, the prosecutor focused heavily on Sotelo's statement to Deputy Carlton during her closing arguments. She began: " 'We're going to get them. And you may or may not catch me.' Well, thankfully, they did catch him, and thankfully, nobody was hurt. But that's why we're here, and that's what you know now after hearing all the evidence in this case, that it was Eduardo Sotelo that attempted to murder a South Los gang member on February 22, 2017, at the Autumn Drive Apartment in San Marcos." Noting that in most cases, a jury would not find out the motive, she explained that in this case, the jury knew the "why." Sotelo's remarks in October 2016 to Carlton established the motive for any retaliatory crime committed thereafter on South Los members. She ended, "Mr. Sotelo couldn't let it go, and that's why we're here."

Sotelo argues the 2016 statement to Carlton was inadmissible because it was irrelevant, or at the very least, substantially more prejudicial than probative. (Evid. Code, §§ 350, 352.) "A defendant's own hearsay statements are admissible against him [citations], as long as they satisfy the test of relevance." (*People v. Lewis* (2008) 43

Cal.4th 415, 529; Evid. Code, § 1220.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) Evidence that produces only speculative inferences is not grounded in reason and therefore is not relevant. (*People v. Babbitt* (1988) 45 Cal.3d 660, 681–682.) All relevant evidence is admissible (Evid. Code, § 351), but Evidence Code section 352 requires exclusion of evidence where its probative value is substantially outweighed by its prejudicial effect.

Prosecutors are given wide berth to vigorously present the facts favorable to their side, as long as the argument amounts to a fair comment on the evidence. (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) Fair comment includes reasonable inferences or deductions but not deliberate or mistaken misstatements of fact. (*Ibid.*) Here, the evidence showed that a VSM youth was killed in October 2016 in a gang-related killing, but there was no evidence a *South Los* member did it. Sotelo told Deputy Carlon that he and/or VSM would retaliate for the youth's death, and there was testimony that VSM had lain low for a period of time. But the shooting victim was never identified, and the youth's murder was never linked to the apartment complex on Autumn Drive. Any inference that *this* shooting was in retaliation for *that* murder four months earlier seems speculative at best.

Nevertheless, no objection was made to the prosecutor's argument, nor was a limiting instruction requested. Sotelo does not argue defense counsel's failure to object to any prosecutorial error amounted to ineffective assistance of counsel. He instead claims the court erred in *admitting* this gang-related evidence. Sotelo cites authority for the

notion that a prosecutor's reliance on inadmissible evidence during closing arguments enhances its prejudicial effect. (E.g., *People v. Minfie* (1996) 13 Cal.4th 1055, 1071.) But he does not cite, nor have we found, any authority stating a prosecutor's argument has bearing on whether evidence is admissible in the first instance.

Focusing on admissibility alone, we find no abuse of discretion. Sotelo's statement to Deputy Carlon was admissible to show his motive in the generic sense for the shooting four months later. It had a tendency in reason to show Sotelo's animosity toward South Los and his willingness to initiate violent action to further VSM's goals. In *Sedillo*, the defendant's recorded statement that as a teen she attacked rival gang members and their infant children at the mall was admissible to show her extreme animosity and willingness to resort to violence to express that animosity. (*Sedillo, supra*, 235 Cal.App.4th at pp. 1058–1059.) Likewise, in *Mendez*, the court properly admitted testimony about the defendant's five prior police contacts, which tended to show that he actively involved himself in the gang's criminal activities rather than passively claim the gang among his peers. (*Mendez, supra*, 7 Cal.5th at p. 691.) Both courts rejected a defendant's claim that the probative value of this testimony was substantially outweighed by the risk of unfair prejudice. (Evid. Code, § 352.)

Similarly, Sotelo's statement was admissible to show a gang-related motive for driving into the heart of South Los territory to shoot at someone who appeared to be affiliated with South Los. It had a tendency in reason to show Sotelo's extreme animosity to South Los and his willingness to *initiate* violent crimes against South Los members to further VSM's retaliatory objectives. Although the 2013 conviction showed similar



animosity and extreme violence, it occurred in response to gang signs and provocation by South Los members. And the mere fact a similar motive could have been established by other evidence does not render its admission *unduly* prejudicial. (See *Tran, supra*, 51 Cal.4th at pp. 1048–1049.)

In short, we find no abuse of discretion. There were permissible inferences that could be drawn as to Sotelo's gang-related motive for the shooting. Even if the 2016 statement to Deputy Carlon was inadmissible for the *specific* motive argued by the prosecutor—i.e., that Sotelo fired shots in retaliation for the VSM youth's murder four months prior—this implicates other types of error than admissibility.

e. *Cumulative Error*

Sotelo argues that the combined admission of his 2013 conviction and his 2016 statement to Deputy Carlon violated his due process right to a fair trial. The erroneous admission of evidence violates due process only if there are no permissible inferences that can be drawn, and the evidence is of such a nature that its admission prevents a fair trial. (*Albarran, supra*, 149 Cal.App.4th at p. 229 [admission of gang evidence violated due process where the only indication a shooting was gang-related was defendant's own gang affiliation].) We found a single error here—admitting the 2013 conviction to show Sotelo's identity as the shooter. This error is harmless given other permissible bases for admitting this evidence and the strength of the evidence that Sotelo was in fact the shooter. It follows that any cumulative effect of the claimed errors does not warrant reversal of the judgment. (*People v. Jablonski* (2006) 37 Cal.4th 774, 825.)

2. *Sufficiency of the Evidence of Intent on Count 2*

Sotelo argues his conviction on count 2 must be reversed because there was insufficient evidence that he *intended* to shoot at an inhabited dwelling. We agree with the People that ample evidence supports his conviction because his intended victim was standing close to an inhabited apartment complex.

The crime of shooting at an inhabited building has two elements—acting willfully and maliciously, and shooting at an inhabited dwelling. (*People v. Ramirez* (2009) 45 Cal.4th 980, 985; see CALCRIM No. 965.) Section 246 is a general intent crime. (*Ramirez*, at p. 985, fn. 6.) "[S]ection 246 is not limited to shooting *directly* at an inhabited or occupied target. Rather, it proscribes shooting *either* directly at *or* in close proximity to an inhabited or occupied target under circumstances showing a conscious disregard for the probability that one or more bullets will strike the target or persons in or around it." (*People v. Overman* (2005) 126 Cal.App.4th 1344, 1355–1356 (*Overman*), accord *People v. Manzo* (2012) 53 Cal.4th 880, 888 (*Manzo*).) In other words, section 246 does not require a specific intent to achieve a particular result, such as to strike an inhabited target. It instead "only requires a shooting under facts or circumstances that indicate a conscious disregard for the probability that one of these results will occur." (*Overman*, at p. 1357.)

In *People v. Chavira* (1970) 3 Cal.App.3d 988, 992 (*Chavira*) the defendant argued he could not be convicted of violating section 246 because he did not shoot "at" a building but instead at persons standing outside, with any impact on the building being accidental. Rejecting that claim, the court explained that an act done with reckless

disregard of its probable consequences is sufficient to establish intent. Thus, by firing a series of shots at persons standing close to a dwelling, there was sufficient evidence of intent to support his conviction. (*Id.* at p. 993.)

Sotelo argues *Chavira, supra*, 3 Cal.App.3d 988 is overbroad and converts section 246 into a quasi-strict liability offense every time a defendant fires a gun near an inhabited dwelling. He claims that under *Chavira's* logic, "any defendant who shoots a gun at a person in a populated area will always be guilty of violating section 246, especially if he misses." But we think Sotelo overstates the point in the interests of argument. Liability for violating section 246 is predicated on the defendant's *conscious disregard* of the likelihood that one or more bullets would strike an inhabited building. (*Overman, supra*, 126 Cal.App.4th at p. 1357.) Naturally, shooting at a person standing in the middle of a cornfield will carry a lower probability of such risk. But that does not convert section 246 into a strict liability offense. And Sotelo neglects to note that several courts have relied on *Chavira's* rule to hold that the intent element for section 246 requires only conscious disregard of the probable risk that bullets will strike an inhabited dwelling. (*Overman*, at pp. 1356–1357; *People v. Cruz* (1995) 38 Cal.App.4th 427,

432–433.) The Supreme Court cited *Chavira* with approval in *Manzo*, *supra*, 53 Cal.4th at page 888, and we decline to revisit its rule here.<sup>6</sup>

3. *Adequacy of Pleading and Proof for the Gang Enhancement on Count 2*

Sotelo next argues that his sentence on count 2 must be reduced due to a failure of pleading and proof on the gang enhancement. The information only alleged a violation of section 186.22, subdivision (b)(1) in connection with count 2, and the verdict forms only listed that statute. Accordingly, he claims the court could not impose the 15-years-to-life alternative sentence under section 186.22, subdivision (b)(4)(B), which was neither pleaded nor specifically found by the jury.

Subdivision (b)(1) of section 186.22 explicitly references subdivision (b)(4), meaning there was no failure of notice in the accusatory pleading. By finding guilt under section 246 and finding the gang enhancement under section 186.22, subdivision (b)(1) true, the jury made all necessary findings for the court to impose the penalty provision under section 186.22, subdivision (b)(4).

The gang enhancement, section 186.22, subdivision (b)(1) provides:

"Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang

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<sup>6</sup> Sotelo does not argue that the evidence is insufficient under the *Chavira* standard. The facts on this point are not in dispute. He fired at an unidentified victim who was standing near an apartment complex in the city of San Marcos. It was early evening, and children were playing outside. The area was "very densely populated," and all four apartments in the vicinity of the fired shots were occupied. Jesus, who watched the incident from his second-story apartment window, saw a bullet pierce his living room wall.

members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished as follows . . . ."

Subdivision (b)(1)(A) through (b)(1)(C) then specify a range of possible terms that are added to the sentence for the enhancement, depending on the nature of the felony.

Section 186.22, subdivision (b)(4) provides in relevant part:

"(4) Any person who is convicted of a felony enumerated in this paragraph committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, be sentenced to an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of: [¶] . . . [¶]

"(B) Imprisonment in the state prison for 15 years, if the felony is a home invasion robbery, in violation of subparagraph (A) of paragraph (1) of subdivision (a) of Section 213; carjacking, as defined in Section 215; a felony violation of Section 246; or a violation of Section 12022.55."

The information charged Sotelo in count 2 with shooting at an inhabited building, in violation of section 246. Attached to this count was the gang enhancement allegation that Sotelo committed this offense for the benefit of a gang within the meaning of section 186.22, subdivision (b)(1). Section 186.22, subdivision (b)(1) enhances a sentence for a felony committed for the benefit of a criminal street gang by up to ten years, depending on the nature of the felony. But when the underlying felony is a violation of section 246, section 186.22, *subdivision (b)(4)* operates as a penalty provision, setting forth an *alternate* sentence for the underlying felony rather than adding years to the base term.

(*People v. Jones* (2009) 47 Cal.4th 566, 576; *People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7.)

All enhancements must be alleged in the accusatory pleading and either admitted by the defendant in open court or found true by the trier of fact. (§ 1170.1, subd. (e).) "An enhanced term cannot be imposed without proof of each fact it requires." (*People v. Hernandez* (1988) 46 Cal.3d 194, 208 (*Hernandez*).) "[I]n addition to the statutory requirements that enhancement provisions be pleaded and proven, a defendant has a cognizable due process right to fair notice of the specific sentence enhancement allegations that will be invoked to increase punishment for his crimes." (*People v. Mancebo* (2002) 27 Cal.4th 735, 747 (*Mancebo*), accord *People v. Houston* (2012) 54 Cal.4th 1186, 1227.)

Nevertheless, "a valid accusatory pleading need not specify by number the statute under which the accused is being charged." (*People v. Thomas* (1987) 43 Cal.3d 818, 826 [where information accused defendant of manslaughter, specified as "willfully, unlawfully, and with/[out] malice aforethought," he could be convicted of *involuntary* manslaughter; inclusion of "willfully" did not deprive defendant of adequate notice]; see § 952 [charge "may be made in ordinary and concise language without any technical averments" and "in any words sufficient to give the accused notice of the offense of which he is accused"].) And pleading defects are not grounds to reverse a judgment unless they "prejudice a substantial right of the defendant upon the merits." (§ 960.)

Section 186.22, subdivision (b)(1) begins: "*Except as provided in paragraphs (4) and (5) . . .*" (Italics added.) This specific reference to subdivision (b)(4) disposes of

Sotelo's claim that the information did not put him on notice that he could be sentenced according to section 186.22, subdivision (b)(4)(B). (*People v. Tennard* (2017) 18 Cal.App.5th 476, 487–488 ["Although Penal Code section 667, subdivision (e)(2)(C) was not referenced in the information, it was not required to be. It was effectively noted by the reference to Penal Code section 667, subdivision '(e)(2)(A),' which specifically references, in its introductory clause, section 667, subdivision (e)(2)(C) as an exception to its provisions."].)<sup>7</sup> Moreover, the jury made all necessary findings to support imposition of the 15-year life term under section 186.22, subdivision (b)(4)(B) when it convicted him of section 246 and found the circumstances in section 186.22, subdivision (b)(1) true. Therefore, there was no failure of pleading or proof, and Sotelo was properly sentenced to 15 years to life on count 2 under section 186.22, subdivision (b)(4)(B).

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<sup>7</sup> Sotelo's cases are distinguishable because the pleadings provided *no* notice. (*Mancebo, supra*, 27 Cal.4th 735, 739 [where jury convicted defendant of forcible sex crime under section 667.61's "One Strike" scheme based on his use of a firearm, and also found the firearm enhancement true, court could not substitute a multiple victim enhancement not alleged in the information to impose the firearm enhancement at sentencing]; *Hernandez, supra*, 46 Cal.3d 194, 208 [court could not impose additional three-year term under former section 667.8 (kidnapping for purpose of rape) where that statute was neither pleaded nor proven and was mentioned for the first time in the probation report].)

#### 4. *Sentencing Issues*

Sotelo was sentenced in March 2018 to an aggregate term of 53 years plus 35 years to life in state prison. In his final set of issues on appeal, he seeks remand for resentencing in light of recent legislative amendments concerning punishment. We accept the People's concession that remand is necessary for the trial court to exercise its discretion whether to strike the serious felony priors imposed on counts 1 and 2. Because this conclusion necessitates a full resentencing hearing, we need not reach Sotelo's remaining sentencing claims.

On September 1, 2018, months after Sotelo's sentencing, the Governor signed Senate Bill No. 1393 into law. (Stats. 2018, ch. 1013.) Effective January 1, 2019, sections 667 and 1385 permit trial courts to exercise discretion at sentencing to strike or dismiss five-year prior serious felony enhancements in "furtherance of justice." (*Id.* at §§ 1–2.) Previously, courts lacked such discretion. (§§ 667, former subd. (a)(1), 1385, former subd. (b); *People v. Williams* (1987) 196 Cal.App.3d 1157, 1160.) As the parties agree, this new law applies retroactively to cases not yet final as of January 1, 2019. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 971–972, citing *In re Estrada* (1965) 63 Cal.2d 740, 744–745; *People v. Pride* (2019) 31 Cal.App.5th 133, 142.)

Remand is required unless the trial court clearly indicated when it originally sentenced Sotelo that it would *not* have stricken a serious prior felony enhancement. (*People v. Jones* (2019) 32 Cal.App.5th 267, 273; *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) As Sotelo argues and as the People properly concede, the trial court gave no such indication when it imposed the serious felony priors on counts 1 and



2. Therefore, the case must be remanded for a resentencing, where the trial court may consider whether to strike or dismiss Sotelo's prior serious felony enhancements in counts 1 and 2.

Under the " 'full resentencing rule,' " when a case is remanded for resentencing by an appellate court, the trial court may reconsider all sentencing choices, including whether to exercise its discretion under section 1385. (*People v. Hubbard* (2018) 27 Cal.App.5th 9, 12–13 (*Hubbard*), citing *People v. Buycks* (2018) 5 Cal.5th 857, 893 [" 'a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances'"].) Because remand is necessary for a full resentencing hearing, we need not reach Sotelo's remaining claims.

Specifically, Sotelo seeks remand for the trial court to exercise its discretion under Senate Bill No. 620. (Stats. 2017, ch. 682, §§ 1–2.) Effective January 1, 2018, Senate Bill No. 620 gives trial courts the discretion under section 1385 to strike or dismiss firearm enhancements under sections 12022.53 and 12022.5. (*Ibid.*; §§ 12022.5, subd. (c), 12022.53, subd. (h).) He claims there is no indication defense counsel or the court was aware of this change during the March 2018 sentencing hearing. For similar reasons, Sotelo also seeks remand for the court to exercise its discretion on whether to strike the gang enhancements under *People v. Fuentes* (2016) 1 Cal.5th 218, 229. Because defense counsel did not address these issues at sentencing, he claims he received ineffective assistance of counsel. The People argue remand is not required because there is no affirmative evidence the trial court misunderstood the scope of its discretionary authority. Because this case will be remanded for a full resentencing hearing, Sotelo may request

the court to exercise its discretion under section 1385 at that time. (*Hubbard, supra*, 27 Cal.App.5th at pp. 12–13 [on remand for resentencing, trial court should consider exercising its discretion under section 1385].) We therefore do not reach these claims.

The same analysis applies for Sotelo's argument under *People v. Franklin* (2016) 63 Cal.4th 261. Sotelo, who was 22 at the time of the offense, argues he is entitled to a limited remand to enable him to make a record of youth-related mitigating evidence for an eventual youthful offender parole hearing. (*Franklin*, at p. 284.) He contends defense counsel rendered ineffective assistance by not making such a record. The People respond that as a third-striker, Sotelo is ineligible for an early parole hearing under section 3051, subdivision (h).<sup>8</sup> As discussed, remand for a full resentencing hearing is required, where the trial court may exercise discretion under section 1385 to strike the prior strike. (*Hubbard, supra*, 27 Cal.App.5th at pp. 12–13.) If it does so, the court should conduct a *Franklin* hearing at that time.

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<sup>8</sup> "Subdivision (h) of section 3051 expressly excludes from eligibility for a youthful-offender parole hearing any inmate sentenced under the "Three Strikes" law, under the One Strike law, or to Life without Possibility of Parole (LWOP) for an offense committed after the defendant turned 18." (*People v. Edwards* (2019) 34 Cal.App.5th 183, 194 [holding the categorical exclusion of one-striker youthful offenders from youthful offender parole hearings violates equal protection]; § 3051, subd. (h).)

## DISPOSITION

The matter is remanded for a full resentencing hearing, where the court may in its discretion decide whether to strike the five-year enhancements for Sotelo's prior serious felony under section 667, subdivision (a)(1) on counts 1 and 2 pursuant to Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1–2). Upon resentencing, the clerk of the superior court is directed to prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

DATO, J.

WE CONCUR:

AARON, Acting P. J.

IRION, J.